A similar point was also raised in *United States* v. *Justices of Lauderdale County* (1882), 10 F. 460; this case involved a Tennessee statute which stated that "every officer shall hold his office until his successor is elected or appointed and qualified."

The rationale of the *Badger, Green,* and *Lauderdale* cases is that the acceptance by an individual of a public office and the awarding of this office upon an individual is "the imposition of a public trust by agreement between the State and the officeholder. Why may not the state attach as a condition to the bestowal of the honors and compensation growing out of the trust, that it shall not be surrendered until the state has designated a successor, so that the public interests shall not suffer?" That rationale appears to be good, consistent, and legally sound insofar as it relates to the Illinois, the Missouri, and the Tennessee statutes. However, it is not sound and it cannot be made applicable to the Alabama statute. To hold that Registrars Livingston and Rogers entered into an agreement with the State of Alabama, when they accepted the appointment of registrars of Macon County, to the effect that they "shall" or "must" or "would" continue in said office until their successors had been appointed and qualified would be to disregard completely the wording of the Alabama statute.

To so hold would be to disregard completely the intent of the Legislature of the State of Alabama, which intent is manifested by the wording of that statute.

To so hold would be to disregard completely § 160, Title 41 of the 1940 Code of Alabama, as amended,[11]

[11] "§ 160. *How offices are vacated.*—Any office in this state is vacated:

"By the death of the incumbent.

"By his resignation, except in such cases as are excepted by law.

[Continued on next page]

which statute specifically recognizes and provides that such offices can be vacated "by * * * resignation, except in such cases as are excepted by law." There are no exceptions in the case of registrars. In this connection, see *Amy* v. *Watertown* (1888), 130 U.S. 301, 316, in which case the Supreme Court recognized that the statute law of Wisconsin providing for the procedure to be followed in cases of resignation "was decisive" and "preclude the operation of any such rule as was recognized in *Badger* v. *Bolles* * * *."

Under the Alabama law, Registrars Livingston and Rogers (as well as any other registrars that accept an appointment while § 22 of Title 17 is in effect) accepted their appointments and agreed to serve "at the will of the appointing board" and with the understanding that they could be removed at any time by a majority of the appointing board (the governor, auditor and commissioner of agriculture and industries) "with or without cause and without giving their reasons therefor." For this Court to follow the *Badger*, the *Green*, and the *Lauderdale* cases and to apply the rationale of those cases to this case would also mean that the registrar who accepted a position under a statute which said he "may hold office for four years" (subject to removal at the possible whim of the appointing board) could not for reasons of health or business, or other good and substantial reasons, in good faith terminate his office by resignation until the appointing authority decided to

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"By ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed.

"By the decision of a competent tribunal declaring his election or appointment void, or his office vacant.

"By the act of the legislature abridging his term of office, when the same is not fixed by the constitution.

"In such other cases as are or may be declared by law."

appoint his successor and until his successor got around to qualifying. This Court must and does now hold that the Legislature of the State of Alabama, in using the word "may" intended that the registrars not be required to hold office for four years from the time of their appointment, but they "may" be removed with or without cause by the appointing board and that they "may" in good faith resign their office. Such an interpretation works no great hardship upon anyone. It does not permit any widespread conspiracy to defeat the law, it does not necessarily permit the paralyzation of governmental functions that are necessary to organized society, and it does not permit any "hiatus or interregnum," since the remedy of mandamus, if the circumstances warrant and justify its use, is always available to require the appointing board to fill, if they refuse to act within a reasonable time, any vacancies that may be created, such as these.

Nothing stated in this opinion should be construed to mean that this Court sanctions or will sanction the proposition (here unnecessarily advanced by Livingston and Rogers) that registrars are free to resign at will, indiscriminately and in bad faith, and thereby cast off all of their responsibilities and obligations as such officers.

The Defendant "The Board of Registrars of Macon County, Alabama":

The next category of points raised by the motion to dismiss relates only to the defendant "The Board of Registrars of Macon County, Alabama." It is contended that this Court has no jurisdiction over the Board of Registrars as such, because, first, said Board is not in fact or in law a separate suable legal entity, and, second, the Board is not a "person" within the

meaning of that section of the Civil Rights Act authorizing preventive relief suits such as this one.[12]

Registration in Alabama is provided for in § 186 of the Alabama Constitution of 1901 and Title 17, § 21 of the 1940 Code of Alabama, as amended.[13] It is the individuals on the Board, and not the Board itself, that conduct the registration; it is the individuals on the Board who may by their "acts and practices" deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional obligation relative to registering qualified applicants of Macon County, Alabama, to vote. Therefore, it is the *individual* officers that preventive relief—here in the form of injunctions—must be obtained against.

In *Handy Cafe, Inc.* v. *Justices of the Superior Court, et al.* (1st Cir., 1957), 248 F. 2d 48, cert. den. March 10, 1958, 356 U.S. 902, the plaintiff sued, under § 1983, Title 42, U.S.C.A.[14] (an old Civil Rights statute), "the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts." Plaintiff there claimed deprivation of certain constitutional rights by those defendants, under color of their respective offices and that it (the plaintiff) had been denied the equal protection of the laws, contrary to the Fourteenth Amendment.

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[12] Sec. 1971(c), Title 42, U.S.C.A.

[13] The pertinent part of that Code section being set out in footnote 2.

[14] "Every person who, under color of any statute, ordinance, regulation or custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable * * *."

The plaintiff there sought declaratory relief and an injunction.

With reference to whether or not "the members of the Superior Court and Supreme Judicial Court" constituted a suable legal entity, the First Circuit Court of Appeals in a *per curiam* opinion [15] stated:

> In addition to the foregoing, we are bound to observe that we know of no authority to the effect that "the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts" constitute suable legal entities. Action under the Civil Rights Act must be against the individual persons or officials who, under color of their respective state offices, subject a person to denial of federal constitutional rights. There are over thirty judges of the Massachusetts Superior Court throughout the Commonwealth and seven justices of the Supreme Judicial Court. Obviously not all of these persons could have been concerned with the various state court proceedings herein complained of. It does not appear against which individuals judgments for damages and enforcement orders are sought to be issued.
>
> All in all, we regard this as a completely preposterous case.

Also in point here is the case of *Hewitt* v. *City of Jacksonville* (1951, 5th Cir.), 188 F. 2d 422, where the court, speaking through Judge Holmes, said:

> The lower court, in refusing to allow the amended complaint to be filed, held that the word "persons" used in the Civil Rights statute, 8 U.S.C.A. § 43, *does not include a State* or its governmental subdivisions acting in their sovereign * * * capacity." [Emphasis added.]

[15] Magruder, Chief Judge, and Woodbury and Hartigan, Circuit Judges, sitting.

> We are in accord with the views expressed by the lower court;

See also the Fifth Circuit case of *Charlton* v. *City of Hialeah* (1951), 188 F. 2d 421, which followed the *Hewitt* v. *Jacksonville* decision.

Even though these cases involved another Civil Rights statute, this Court is of the opinion that the reasoning and conclusions reached are sound and should be applied in this case to plaintiff's action against "The Board of Registrars of Macon County, Alabama."

The Defendant State of Alabama:

The motion to dismiss filed by the State of Alabama contains some fifty-eight grounds. These grounds fall into five general categories. They are:

(1) Civil Rights Act of 1957 authorizes actions only against "individual persons" and not states.

(2) States have exclusive jurisdiction in the field of voting by reason of the Tenth and Eleventh Amendments to the Constitution of the United States.

(3) Supreme Court of the United States has original and exclusive jurisdiction in cases involving sovereign states.

(4) Civil Rights Act of 1957 (particularly Part IV) is unconstitutional.

(5) Even if this Court determines that it has jurisdiction and determines that the Act is constitutional, it should refrain from exercising jurisdiction in this case because of comity.

Category two is obviously without merit. Part of what this Court said in the case of *In re: George C. Wallace, et al.*, 170 F. Supp. 63 (decided January 9, 1959), is applicable in this case and is dispositive of these points:

The authority delegated to the Federal Government by the Fifteenth Amendment to the Constitution of the United States is undoubtedly the authority under which the Congress of the United States was acting when the Civil Rights Act of 1957 was passed. The provision in the Act providing for investigation of alleged discriminatory practices, including inspection of voting and other pertinent records, must be considered to be an essential step in the process of enforcing and protecting the right to vote regardless of color, race, religion, or national origin. That part of the Act is, therefore, by this Court considered "appropriate legislation" within the meaning of Section 2 of the Fifteenth Amendment.

The sovereignty of the State of Alabama, or of any other of the states, must yield, therefore, to this expression of the Congress of the United States, since this expression of Congress—by this Act—was passed in a proper exercise of a power specifically delegated to the Federal Government, and the Court cites *Ex Parte Siebold*, 100 U.S. 371. This is necessarily true even though the states possess concurrent legislative jurisdiction with respect to voting, since the Federal Government, and its law, is supreme in this area. The Court cites *Kohl* v. *United States*, 91 U.S. 367.

The concept of the sovereignty of the states is embodied in the Tenth Amendment to the Constitution of the United States, this amendment providing that those powers are reserved to the states which have not been "delegated to the United States by the Constitution, nor prohibited by it to the States."

Here we have involved the very powers which the Constitution of the United States says are not reserved to the states. See *United States* v. *Reese*, 92 U.S. 214; *United States* v. *Darby*, 312 U.S. 100; and *Fernandez* v. *Wiener*, 326 U.S. 340.

> The fact that the State of Alabama voting and registration records are involved in this case does not alter the legal principle at all. *In re: Cohen,* 62 F. 2d 249; *United States* v. *Ponder,* 238 F. 2d 825; *Endicott Johnson Corporation* v. *Perkins,* 317 U.S. 501.
>
> Thus, it must be generally concluded, and this Court now concludes, that since the Congress of the United States did have the authority to pass the Civil Rights Act of 1957 and that said authority is supreme in this field as opposed to any authority of the states, and since the Commission on Civil Rights was in issuing the subpoenas in question acting pursuant to that Act, and since this Court was in issuing its order upon the application of the Attorney General of the United States also acting pursuant to said Act, the contention that movants make that enforcement of the subpoenas will constitute an illegal invasion of the sovereignty of the State of Alabama and the contention that this Court is without jurisdiction to enforce compliance with said subpoenas are without merit and cannot stand.

As to defendant's contention that the Supreme Court has original jurisdiction, there is no question. See Article III, § 2 of the Constitution of the United States. Also *United States* v. *West Virginia,* 295 U.S. 463, 470, and *United States* v. *California,* 297 U.S. 175, 187. However, it is not true that this jurisdiction is exclusive. In the *California* case, supra, the Supreme Court held that venue properly lay in the district court in California in an appropriate case. See also *New York* v. *United States,* 326 U.S. 572, and *Colorado* v. *United States,* 219 F. 2d 474. Here, there is in 42 U.S.C.A. § 1971 (c) and (d), specific and unambiguous Congressional authorization for actions such as this one to be commenced in this Court.

Because of the conclusions hereinafter reached by

this Court in connection with the State's motion and in keeping with the duty of any court to avoid constitutional questions unless essential to a proper disposition of a case,[16] this Court will not, at this time, pass upon the question of the constitutionality of Part IV of the Civil Rights Act of 1957. It is also unnecessary to discuss in this opinion the objections of the State upon the ground of comity.

The category of objections remaining concern the question of whether or not the Civil Rights Act of 1957 authorizes actions for preventive relief by the Attorney General against states. Without any doubt, the Congress of the United States had the authority to grant such a right.[17] The question here is: Did it confer that authority in this Act? This Court is of the opinion that Congress did not intend for such actions against states to be authorized by this Act.

There is no doubt that such authority would be appropriate—and even in certain circumstances necessary—if Congress intended to give full and complete authority to the Attorney General of the United States to enforce the constitutional rights here involved. This Court judicially knows that the Civil Rights Act of 1957 was a compromise measure and the compromise reflected an intention on the part of Congress to give limited authority—as opposed to full and complete authority—in this field. A reading of the legislative history of this Act impresses this Court with the fact that if it had then been mentioned that this Act authorized the United States to sue a state for preventive relief, the Act would not yet be

[16] For two recent cases reiterating this proposition see: *Harmon* v. *Brucker* (1958), 355 U.S. 579, 581, and *Byers* v. *Byers* (C.C.A. 5, 1958), 254 F. 2d 205, 208.

[17] See the reasoning of this Court on the authority of the Federal Government in the field of voting in the case of *In re George C. Wallace et al.*, supra.

passed.[18] As a matter of fact, it is very definitely inferred by the following statement of Attorney General Brownell that the Act was only to be used to obtain preventive relief against individual persons:[19]

> Mr. BROWNELL. It is my opinion that the bill before you from which you quoted does not increase the Department's jurisdiction in connection with State primary elections. At the present time, our jurisdiction is limited to commencing criminal proceedings under sections 241 and 242, which are the criminal provisions of the civil-rights laws. Under 242, it is necessary that the wrongdoer be a State officer. In other words, that he be acting under color of law. Under section 241, you have to prove a conspiracy. The statute operates only against conspirators, in other words.

The Court must presume, therefore, that Congress in using only the word "person" deliberately restricted the authority of the Attorney General to institute such actions. Such reasoning as now used and the conclusion as is now reached is analogous to the reasoning and conclusion of the Supreme Court of the United States in *United States* v. *Mine Workers* (1947) 330 U.S. 258, 275. In that case, the court held, among other things, that the Norris-LaGuardia Act did not apply to the "Government in all cases" and observed:

> The Act does not define "persons." In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so * * *. The absence of any comparable provision extending the term

[18] In this connection, see the testimony and statements of Attorney General Brownell before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, Eighty-fifth Congress, at pages 570, 589, 590, 591, 599, and 602.

[19] Ibid, page 606.

to *sovereign governments* implies that Congress did not desire the term to extend to *them*. [Emphasis added.]

In accordance with the foregoing, an appropriate order will be entered dismissing this action as to each of the defendants.

Since the action is to be dismissed as to all defendants, the motion to produce, as to each of them and their objections thereto, and the motion to strike and quash service are moot.

Done, this the 6th day of March, 1959.

FRANK M. JOHNSON, JR.,
United States District Judge.

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

No. 17684

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF ALABAMA, ET AL., APPELLEES

Appeal from the United States District Court for the Middle District of Alabama

(June 16, 1959)

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges

HUTCHESON, *Chief Judge:* This appeal tests for error the order of the district judge dismissing the complaint as to all the defendants for the reasons stated in his opinion [1] as to each.

This is the record. On February 5, 1959, the United States of America, appellant, filed an action against appellees Grady Rogers, E. P. Livingston, and the Registration Board of Macon County, Alabama. This action was brought under Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S. Code, sec. 1971) [2] to obtain preventive relief against

[1] *United States of America* v. *State of Alabama, et al.*, 171 F. Supp. 720.

[2] Sec. 1971(c): "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to

certain act and practices which deprive citizens of their right to vote on account of race or color.

The complaint specifically alleged the following facts. The appellees, the Registration Board and Rogers and Livingston, sued as members, who, under Alabama law are responsible for registering qualified citizens for voting, have engaged in certain discriminatory acts and practices. Among those practices are the maintenance of separate and segregated registration facilities for negroes; the application of more stringent and more rigid registration standards to negroes than to whites; and various other acts and practices which clearly set forth denial of registration to vote solely on account of race or color. Such discriminatory acts and practices have brought about and perpetuated a great disparity between the respective percentages of white and negro citizens of voting age registered to vote in Macon County, Alabama, despite the fact that negro citizens of voting age in Macon County greatly outnumber white citizens of voting age.[3]

Appellees Rogers and Livingston, who are *not before*

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engage in any act or practice which would deprive any other person of any right or privilege secured by subsec. (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

[3] In 1958 white citizens of voting age numbered approximately 3,100, whereas negro citizens of voting age numbered approximately 14,000. As of Dec. 1, 1958, white citizens registered to vote in Macon County numbered approximately 3,016, or approximately 97% of the white population of voting age; and the negro citizens registered to vote in Macon County numbered approximately 1,100, or approximately 8% of the negro population of voting age (Complaint, par. 8, 9, R. 3).

the court as individuals but only as members of the Board of Registration, resigned as registrars of Macon County in Dec., 1958, some two months before this suit was filed. Their resignations were absolute and unconditional, and it was shown by affidavits, depositions and documents, that neither intended to serve again as a member of the Board of Registration, that their resignations had been accepted by the appointing board, and that each had accepted and qualified for another public office. The Registration Board, for the purpose of preventing negroes from registering, became inoperative during long periods of time from 1946 to present. The latest paralysis of that office occurred in December 1958 and was caused by the purported resignation of its only two members.

An *injunction* was sought to prevent the above named appellees from engaging in the alleged acts, practices, methods or procedures in whatever form, which discriminate against any applicant for registration for voting in Macon County, Alabama, on account of his race or color.

Subsequently on February 23, 1959, appellant amended the original complaint to include as a party defendant the State of Alabama. This amendment averred that the State of Alabama, through its agents, officials and agencies, had engaged in the discriminatory and unlawful practices specified in the complaint.

The amendment sought a *declaratory judgment* of the illegality of these acts and practices and a judgment "*enjoining* Defendant State of Alabama from engaging in such illegal acts and practices in the future and from interfering with the performance of such acts and practices as may be required by the Constitution and laws of the United States and the decree of this Court".

Appellees filed motions to dismiss.[4] Essentially, appellee State of Alabama objected to the action on the ground that the Civil Rights Act of 1957 does not authorize suits against states but only individual "persons" and that the State is not a "person" within the meaning of the Act; that states have exclusive jurisdiction in the field of voting by virtue of the Tenth and Eleventh Amendments to the United States Constitution; that in any event the District Court has no jurisdiction over actions involving a state; and that the Civil Rights Act of 1957 is unconstitutional. Appellees Rogers, Livingston, and the Registration Board objected to the complaint on the ground that the suit was improperly brought against Rogers and Livingston because they had effectively resigned their office as registrars; that the Civil Rights Act of 1957 does not authorize suits against the Registration Board but only against individual persons; that the State of Alabama is an indispensable party; that the action is precluded by the Eleventh Amendment to the Constitution; and that the registration board was not a suable entity under the laws of the State of Alabama.

The court below dismissed the complaint as to all defendants. With respect to appellees Rogers and Livingston, it held that they could not be made defendants because their resignations were effective in all respects, and that under the applicable Alabama law registrars have no obligation to continue to serve until successors were appointed to fill that office. The court dismissed as to the Registration Board on the

[4] In addition to the motions to dismiss appellees filed several other motions including a motion to strike and quash service, an answer or objection to the motion to produce, and a motion to dissolve the temporary restraining order. The issues on these subsidiary motions were essentially the same as on the motions to dismiss.

grounds that it was not a suable legal entity under Alabama law and that in any event the Civil Rights Act of 1957 does not authorize suit against such a board, but permits a suit only against individual persons as members of the Board.

The court held that the action would not lie against the State of Alabama, on the ground that the Civil Rights Act of 1957 did not authorize a suit against a state. Having held, for the reasons stated as to each, that none of the defendants were subject to the suit, the court entered a judgment dismissing it as to each.

Appealing therefrom, plaintiff-appellant is here urging against the judgment three specifications of error:

> 1. The district Court erred in holding that 42 U.S.C. 1971(c) does not permit the Attorney General to bring an action against the State of Alabama or the Board of Registrars of Macon County, Alabama.
>
> 2. The District Court erred in holding that an action under the Civil Rights Act of 1957 will not lie against registrars who have purported to resign their office, but for whom no successors have been appointed.
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> 3. The District Court erred in holding that the Board of Registrars of Macon County, Alabama, is not a suable legal entity.

and seeking its reversal.

Paramounting the first specification, that the court erred in holding that the statute upon which the suit was based does not permit the Attorney General to bring an action against the *State* of Alabama, appellant devotes the major portion of its brief to a discussion and argument which, not confining itself to an interpretation and construction of the statute, but, taking far wider range, undertakes to discuss not the

actualities of the jurisdiction claimed to have been conferred by the statute but the possibilities in general of conferring upon the federal courts jurisdiction of an action against a state of the kind asserted here.

Interesting and engaging as these speculations are, we will not indulge in them here, but, confining ourselves to the sole question for determination, whether the statute supports the jurisdiction asserted, we will state simply but categorically that we agree with the district judge that neither on its face nor in its history, taken alone or in connection with civil rights legislation in general, is there any reasonable basis for holding that, in providing "whenever any person, * * *", the congress intended to, or did, provide for suit against a sovereign state.

Without elaborating upon it, as under the settled law of the cases we could do in extenso, it is sufficient for us to simply say that, under the principle which has been, and still is, controlling upon the federal courts, whatever congress might or could do in providing in a civil rights action for conferring federal court jurisdiction over a state, it has never heretofore done so and it has not in terms done so in the statute invoked here.

Absent such specific conferring of jurisdiction, a federal court would not, indeed could not, assume jurisdiction over a sovereign state without a precedent determination that, though the jurisdiction had not been expressly conferred, the language of the invoked statute carried the necessary, the unavoidable implication that the congress upon the gravest considerations and after the utmost thought and deliberation had intended to and did confer it.

Reading the statute as one will, such an implication cannot be found in it. For it cannot be reasonably contended that the congress intended in a situation of

this kind, where both the complaint and the Alabama statutes themselves, of which we take judicial knowledge, plainly show, that no exception or objection is, or can be, made on any kind of constitutional grounds to the will of the state there expressed, or that there is any need for, or justice in, finding authority under this statute to sue the state itself for the wrongs upon the statute and upon it perpetrated by its allegedly unfaithful servants. Indeed, the gravamen of the complaint against the officers of the state who subvert and pervert the state's will, as expressed in its statutes,[5] is that defendants Rogers and Livingston, "in

[5] In *Constantin* v. *Smith*, a suit against the governor of the State of Texas, 57 F. (2) 227, affirmed in *Sterling, Governor of Texas* v. *Constantin*, 287 U.S. 378, the court thus clearly and correctly stated the principles controlling in civil rights suits such as this one:

"Upon the first proposition advanced, that this is a suit against the state, and that as such it may not be maintained the authorities overwhelm: that this is a suit under the first subdivision of Sec. 41, 28 U.S.C.A., Sec. 24, Subd. 1 of the Judicial Code, to redress the deprivation of property arising under the Constitution and laws of the United States (*Holt* v. *Indiana Mfg. Co.*, 176 U.S. 70). As such it is not a suit against the state, but against persons in their individual capacities, to prevent them from enforcing statutes in themselves unconstitutional, or unconstitutional as attempted to be enforced and applied. In such a suit, when it is found, that 'an individual, acting under the assumed authority of a state, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The state has no power to import to him any immunity from responsibility to the supreme authority of the United States.' *Ex parte Ayers*, 123 U.S. 507; *Reagan* v. *Farmers' Loan & Tr. Co.*, 154 U.S. 362; *Ex parte Young*, 209 U.S. 123; *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Truax* v. *Raich*, 239 U.S. 33; *Greene* v. *Louisville & Int. R.R.*, 244 U.S. 507; *McMilan* v. *Comm.*, 51 F. (2) 400; *McLeaish* v. *Binford*,

the course of their official duties have discriminated against qualified Negro citizens on account of their race or color, and a judgment is sought declaring such past acts and practices to be illegal under the constitution and laws of the United States. Further an order is sought enjoining said defendants so long as they remain responsible for the duties of their office and their successors when appointed and qualified from engaging in such illegal acts and practices in the future."

We thus come to the second specification of error that, though, as the district judge expressly found, the two, sued as board members, had, some two months before the suit was brought, in good faith resigned their offices and each has taken another state office, they can and should be treated as still members of the board, to say of it that we think the short and simple answer to it is that the supposed need for someone to sue cannot be made, as appellant seeks to make it, to serve as a valid reason for rejecting out of hand

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52 F. (2) 151. In this suit plaintiffs invoke the exercise of the judicial power of the United States which, vested by the Constitution in its courts, extends to all cases of law and equity arising thereunder. * * *"

"No exertion of this power rests on clearer or more certain grounds than that of its chancery jurisdiction. * * *"

"Of the chancery jurisdiction no phase of it has a better settled basis, a more comprehensive and remedial scope than that which it employs to prevent persons, acting under the authority or color of state laws, from denying the due process and equal protection which the Fourteenth Amendment guarantees. This must necessarily be so, for, independent of each other in their respective spheres as are the state and federal governments, the Constitution of the United States is the supreme law of the land, and the courts of the United States, as the repositories of federal judicial power, are compelled to and will assert and vindicate its supremacy, to protect the rights of individuals menaced by personal aggression masked under official power. * * *"

the general principle, which underlies and conditions, existence and exercise of jurisdiction over a person sued in a particular capacity, that such person has that capacity.

In addition to pointing out, as the district judge did, that the remedy does not lie in perverting jurisdictional processes by means and to ends as injudicious as they are unjudicial, by holding one who is not an officer responsible as such, but that it lies in taking appropriate action under *Alabama law* to compel those authorized to, and responsible for, constituting and filling vacancies in the membership of the Board of Registrars to fill those offices, it is sufficient to say that these considerations aside, we are of the clear opinion that the reasons given by the district judge for rejecting this contention of plaintiff-appellant are sound, indeed unanswerable, and that we approve and adopt them.

Of the third and final specification, that the Board of Registrars, without members to be sued or served, constituted a legal entity which must stand in judgment in this suit, we think we need do no more than say that no sound argument is presented or authorities cited against the decision reached and the judgment entered by the district judge. Indeed, no argument is presented in support of the action which the court below was asked, but refused, to take, that is to assume jurisdiction over a board without members, a jurisdiction which, for lack of process it did not and could not assert, except the same argument of Necessity or Desirability made in connection with the second specification. Putting to one side: that such an argument may not serve other than as a cautionary warning against too readily accepting an apparently wrong result as a right one; that it can never take the place of, or serve as real grounds for assert-

ing, jurisdiction, to point out, as the district judge did, that the remedy lies not in trying to sue a memberless board *but in a suit against the appointing officers of the state* to require the appointment of members to the board, we think it beyond any doubt that there is no basis for the claim that, in ruling as he did, for the reasons that he gave, the district judge in any way erred.

Stating: "It is the individuals on the Board and not the Board itself that conduct the registration; it is the individuals on the Board who may by their 'acts and practices' deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional obligation relative to registering qualified applicants of Macon County, Alabama, to vote, therefore, it is for the individual officers that preventive relief—here in the form of injunctions—must be obtained against.", the district judge, citing *Handy Cafe, Ins.* v. *Justices,* 248 F. (2) 485; *Hewitt* v. *City of Jackson,* 188 F. (2) 423; and *Charleston* v. *City of Hialiah,* 188 F. (2) 421, to which may be added *McSwan* v. *County Board,* 104 F. Supp. 861, *Gerald Graves* v. *City of Boliver,* 154 F. Supp. 625, correctly we think, appraised the legal situation arising on the facts and correctly denied the relief asked. In reaching this conclusion we have not overlooked or disregarded *Garner* v. *McCall* (Ala.), 178 So. 210 and *Boswell* v. *Bethea* (Ala.), 5 So. (2) 816, cited by the appellant as requiring a contrary ruling. We think appellant's reliance on them will not at all do. Indeed, we think that the Boswell case which dealt with an appeal from a judgment of the Circuit Court in a suit against the Board of Registrars, composed of the three members, naming them, explicitly confirms the position of the district judge that, suing a board hav-

ing no members is as inconceivable in law as suing, as members of a board, persons who are not such, and that under the facts established and found, the judgment must be affirmed.

Affirmed.

In the United States Court of Appeals for the Fifth Circuit

JUDGMENT

[Extract from the Minutes of June 16, 1959]

No. 17684

UNITED STATES OF AMERICA

v.

STATE OF ALABAMA, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

U. S. GOVERNMENT PRINTING OFFICE 1959